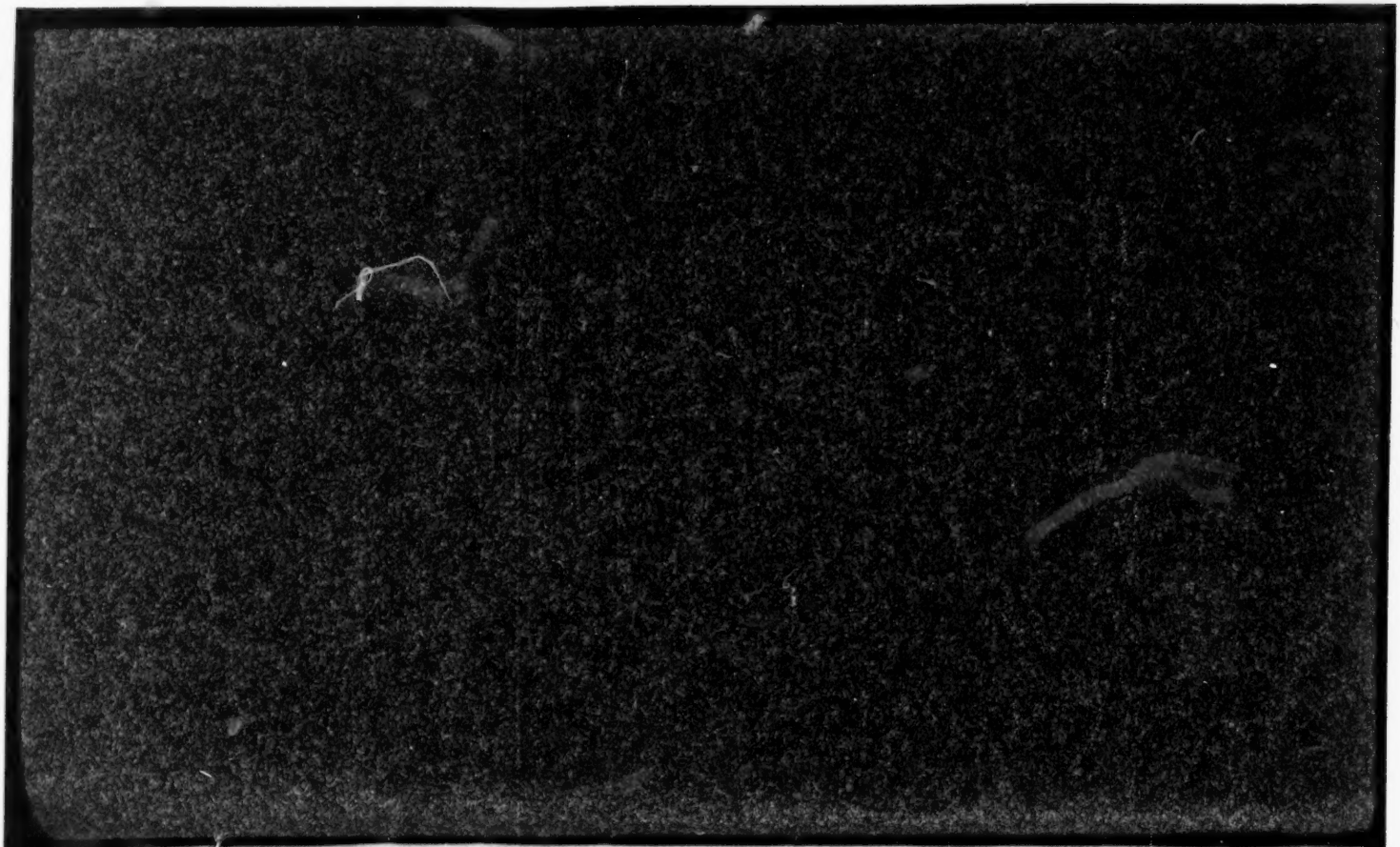


In the Supreme Court of the United States.

OCTOBER TERM, 1910.

Nos. 887 and 888.

HENRY C. RIPLEY, APPELLANT,

v.

THE UNITED STATES, APPELLEE.

THE UNITED STATES, APPELLANT,

v.

HENRY C. RIPLEY, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT OF THE CASE FOR THE UNITED STATES.

The suggestion of opposing counsel that the *nisi prius* designations of the parties here be used in the briefs is a good one, and we will follow it.

The statement of this case for claimant contains so many inferences and conclusions sought to be drawn from the facts as found by the court that we deem it advisable to state the case in full, as we understand it. Before proceeding, however, we call attention to a statement contained in the last

paragraph, beginning on page 5 of claimant's brief. It is there said that the plan or design for the jetty in question "had been strongly opposed by the Corps of Engineers." We search the findings in vain for any such statement of fact. But conceding it to be a fact of which the court may take judicial notice as coming from the public hearings before the Rivers and Harbors Committee of Congress and the official reports of the Engineer Department of the United States Army, it is important only in connection with what immediately follows the statement above quoted. It is apparent upon the slightest reflection that whether the engineer officers were opposed to the plan or not would in and of itself have no possible bearing upon a contract duly entered into, or upon the manner of its performance. But, it is stated that—

> claimant had scarcely entered upon the fulfillment of his contract before the Government representative in charge began to impede and embarrass him by his construction of the specifications and by arbitrary exercise of authority, etc.

The Court of Claims made no such statement in its findings, nor did it state any matter from which it is fair to draw such an inference.

We could not, of course, object to counsel urging this view upon the court as an argument, under proper conditions, in support of its contentions. But, since we understand a "statement of the case" to be merely a narrative of the facts as found by

the trial court, we are compelled to respectfully suggest that claimant's statement be not accepted as the plain statement of the facts in this case.

At some time prior to 1902 a company known as the Aransas Pass Harbor Co. undertook to construct a jetty at Aransas Pass, on the coast of southwestern Texas, in accordance with a design for a "reactionary" jetty, patented by Prof. Louis M. Haupt. Under the auspices of this company certain portions of the projected jetty were partially constructed.

In June, 1902, Congress made an appropriation of $250,000 for the purpose of completing the "north jetty" in accordance with the design and specifications of the Aransas Pass Harbor Co. and to do such additional work "as may be necessary for strengthening such jetty." (Finding II, Transcript, p. 22.)

Following this appropriation, the War Department, through its district engineer located at Galveston, Tex., began preparations for carrying out the purposes of the appropriation. The first thing was to prepare specifications for the work. To this end Henry C. Ripley, the "claimant" in this case, was invited to assist, and did assist, in the preparation of the specifications. After the same had been prepared they were published and invitations for proposals called for, on October 10, 1902, by Capt. C. S. Riche, district engineer, United States Army (Finding III, Transcript, p. 22), and a copy of the same was sent to claimant and to Prof. Haupt, who had been consulting engineer of the Aransas Pass Harbor Co. and who was the patentee of the plan or design on

which the jetty in question was being constructed. (Finding IV, par. 1, Transcript, p. 23.)

After receiving the copies of said specifications both claimant and Prof. Haupt objected to "some features" thereof, because they did not conform to the plan and specifications under which the Aransas Pass Harbor Co. had been procuring the work to be done. The specific features objected to are not set forth in the findings of the court, but are referred to in such a way as to distinguish them. (Finding IV, par. 2, Transcript, p. 23.)

The principal objection related to the elevation of the proposed jetty above low water and to its width on top. It was suggested by claimant or by Prof. Haupt that the crest of the completed structure be made 1 foot lower and 5 feet narrower than was provided for in the specifications submitted. Objection was also taken to the provision for beginning the work, it being claimed that it was part of the plan of the Aransas Pass Harbor Co. to build the jetty from the outer end toward the shore. Some question was also raised as to the right of the Aransas Pass Harbor Co. to have an inspector on the work (par. 5, amended petition, Transcript, p. 7).

As a result of these objections the Chief of Engineers directed Capt. Riché to withdraw the specifications published and prepare new ones, so as to fully agree with the original designs and specifications of the Aransas Pass Harbor Co., and that before reissuing the same the approval of said company be obtained.

In order to avoid the loss of time which would

necessarily occur in case the specifications were reissued and invitations for proposals readvertised, Capt. Riché, Mr. Ripley, and Prof. Haupt agreed upon certain modifications which made them satisfactory to the Aransas Pass Harbor Co., and they were embodied in amendments which were published on November 9, 1902, and submitted to intending bidders. (Par. 2, Finding IV, Transcript, p. 23.)

These modifications, while not set forth in the finding, are referred to and will be found in the amended petition, paragraph 5. (Transcript, pp. 7 and 8.)

On March 11, 1903, claimant submitted a bid to construct said jetty, in accordance with the advertisement and specifications as amended. Said bid was accepted, and on the 6th day of April, 1903, a written agreement was entered into by and between said Henry C. Ripley, claimant, and Capt. Riché for the United States, wherein it was agreed that claimant should construct said jetty in accordance with the amended specifications, furnishing and placing, for that purpose, 31,480 tons, more or less, of small riprap, for which he was to receive compensation, when properly placed in the work as required by the specifications, $3.75 per ton; 21,000 tons, more or less, of large riprap, for which he was to receive, when properly placed in the work in accordance with the specifications, $4.80 per ton; 2,510 tons, more or less, of "large blocks," for which he was to receive compensation, when properly placed in the work in accordance with the specifications, $5.10 per ton.

In addition to this, he was to furnish an indefinite quantity of large riprap obtained in the quarrying of small riprap, for which he was to receive, when properly placed in the work according to the specifications, $4.25 per ton. This contract was approved by the Chief of Engineers April 20, 1903, and provided that the work of placing rock in the jetty should begin within 90 calendar days from that date and should be completed on or before January 31, 1904. (Finding V, Transcript, p. 23; Par. VII of the petition, Transcript, p. 9; Par. V of the petition, Transcript, p. 7.) The number of tons of each class of stone was determined by the estimated quantity of such necessary to make complete a certain portion of the jetty, and to bring the total amount to be paid therefor within the appropriation available. (Transcript, p. 8.)

Claimant entered upon the performance of said contract on the 18th day of August, 1903, and completed the same about September 17, 1904. The placing of the quantities of rock of the different classes above indicated effected the completion of about 2,100 feet of the jetty, from the outer end toward the shore. (Par. 1, Finding VI, p. 23.)

The United States placed an inspector of the stone at Rockport (Finding XV, Transcript, p. 27), where the stones were received from the quarries to be conveyed by sea to the site of the work, where another inspector was in charge for the United States. The inspector stationed at Rockport weighed and measured the stones intended for "crest blocks" and

marked the same "accepted" or "rejected,' according as he found them to be within or without the provisions of the specifications, with reference to the size, shape, and dimensions thereof. The inspector at the site of the work again passed upon or inspected said crest blocks, and it so happened that he sometimes *accepted* stones intended for crest blocks which had been *rejected* as such by the inspector at Rockport, and the same were placed on the crest of the jetty and paid for as crest blocks. It does not appear that in any instance he ever *rejected* a stone which had been *accepted* as a crest block by the inspector at Rockport.

The stones "rejected" as crest blocks, were used as large riprap and paid for as such. Crest blocks, it will be remembered, were to be paid for at the rate of $5.10 per ton, and large riprap at $4.60 per ton, the difference, 50 cents per ton, for the 90 stones rejected as crest blocks but used as large riprap, amounting to about $400. (Finding VI, Transcript, p. 24; Petition, par. 7, Transcript, p. 9.)

Claimant Ripley complained both to the inspector in charge at Rockport and to the district engineer at Galveston about the rejection of said stones intended for crest blocks, contending that the specifications provided for "mean measurement" of the blocks, whereas the inspector and the engineer in charge held that the specifications provided for "extreme measurement." (Finding VI, par. 2, Transcript, p. 23.)

In this connection, it may be well to explain the meaning of the terms "mean" and "extreme" measurements, although it may more properly belong in the argument. The exact language of the specification describing the crest blocks is as follows:

> Large blocks shall be granite or other rock weighing not less than 160 pounds per solid cubic foot. It shall be of good durable quality, hard, tough, sound, clean, of compact texture, free from loose seams and other defects. Blocks shall be as closely rectangular in form as practicable and varying not over 6 inches from the dimensions 3½ feet by 5 feet by 8 feet. Their bed surfaces shall be as nearly plane as practicable. (Specifications, latter part of par. 60, Transcript, p. 6.)

According to the construction given this provision by the engineer in charge and his inspector, a stone which at any point exceeded 8 feet and 6 inches or fell below 7 feet and 6 inches in length was rejected. Likewise as to its thickness and breadth. To be more specific, if the stone was 5 feet wide throughout its length, 3½ feet thick throughout its length, its bed surface plane and as closely rectangular in shape as practicable, and its main part 8 feet long, but had a projection which when measured with the main part of the stone made 9 feet in length, the stone would be rejected as varying more than 6 inches from the dimensions specified; or if the stone was 8 feet in length throughout its breadth, 5 feet in width throughout its length, and 3½ feet thick throughout its main

length, but had a hump which was 4½ feet in heighth from its bed surface, it would be rejected as varying more than 6 inches from the dimensions specified.

According to the contention of the contractor, even though a stone might be within the specifications as to width and height, but reached at one point 9 feet, it should be accepted if the mean or average length of the stone, taking its width 5 feet as the basis for calculation, was within 6 inches of 8 feet, and so with each of the other dimensions of the stone offered. The contractor contended that the average or mean dimension should be accepted.

Not being able to agree as to the proper construction of the specifications with respect to this matter, the contractor addressed a letter to the engineer in charge at Galveston, Tex., in which he complained in substance that it was never contemplated that these large stones should conform to the exact dimensions required by the specifications; that it had been found very difficult to get them out at the quarries so as to conform to the requirements of the specifications, and urged, that inasmuch as a slight variation would not in any way diminish the value of the block for the purpose for which it was to be used, the Government should accept "any block that is as valuable or more valuable * * * and will make the work as stable or more stable than if the dimensions conformed strictly to the letter of the specifications." (Par. 6 of the Findings, Transcript, p. 24.)

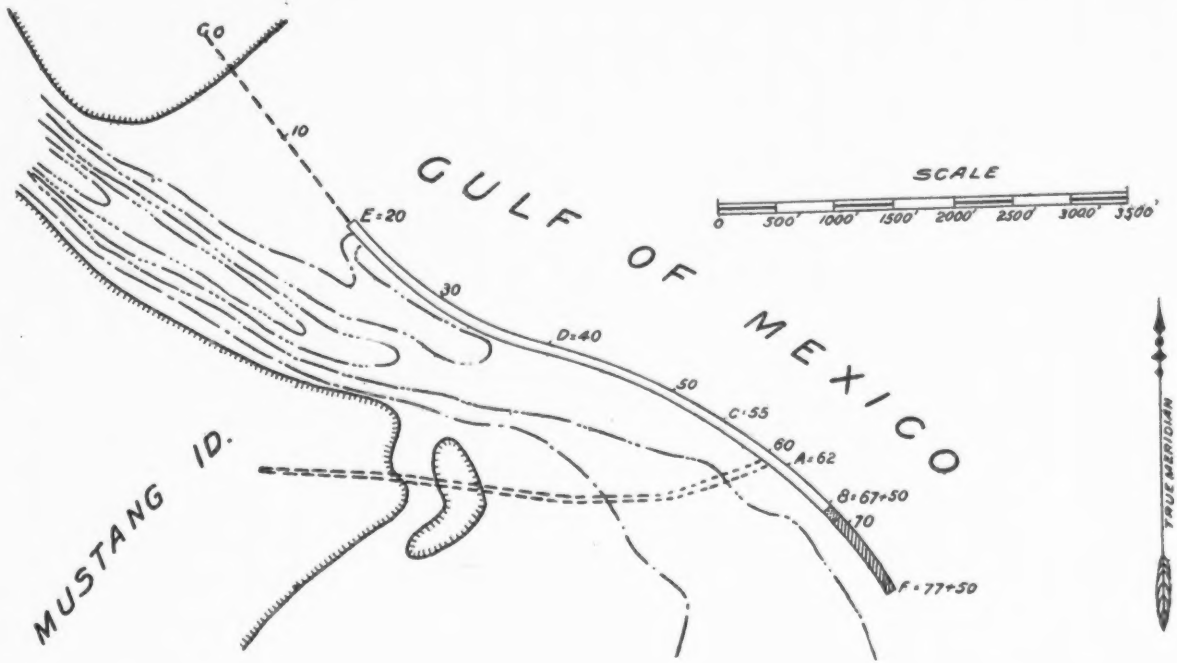
This letter was dated May 22, 1904, and was immediately referred to the Chief of Engineers at Wash-

ington. Thereafter a supplemental agreement was entered into and finally approved by the Secretary of War, becoming effective September 1, 1904, wherein and whereby it was agreed in effect that while the blocks should conform to the specifications previously agreed upon, nevertheless any large block that would be as valuable or more valuable to the United States and would make the work as stable or more stable than if the dimensions conformed strictly to the letter of the specifications, would be accepted by the Government. (Transcript, p. 14, par. 60.)

Only six crest blocks were received or offered subsequent to the date of this supplemental agreement, two of which were rejected. It does not appear that any part of the $400 above mentioned was for the difference between the value of said two rejected crest blocks as crest blocks and large riprap, nor does it appear what was the reason for the rejection of said two crest blocks.

In addition to the $400 claimed and allowed, as above stated, the court finds that the rejection of the 90 stones offered as crest blocks compelled the contractor to obtain and furnish other crest blocks to take the place of those rejected, "which caused a delay of 10 days to claimant in the completion of the work." (Finding VI, Transcript, p. 24.)

The court finds that the average daily "cost" to the contractor in the performance of his contract was $162.70. (Finding 17, Transcript, p. 28.)


GULF OF MEXICO
MUSTANG ID.
SCALE
0 500' 1000' 1500' 2000' 2500' 3000' 3500'
GO
10
E=20
30
D=40
50
C=55
60
A=62
B=67+50
70
F=77+50
MAGNETIC TRUE

Of the total amount of the judgment rendered against the United States, $1,627 is for the delay aforesaid and $400 for the difference between the value of the crest blocks and large riprap. These two items are contested here by the Government. (Assignment of error 1, post, p. 22.)

The claimant began work under his contract at the outer end of the jetty, which is represented on the sketch on page 11 by the letter and figures "F–77+50," and continued his operations until about 2,100 feet of the jetty had been completed, which carried the completed work up to about the station marked "C–55." (First paragraph of Finding VI, Transcript, p. 23.) Over this entire distance the foundation of the jetty had been laid by the Aransas Pass Harbor Co. (First paragraph, Finding VII, Transcript, p. 25.) The court further finds that from station C–55 to station 27 the entire core of the structure had been built up, and between stations 27 and D–40 the crest blocks had been laid. (First paragraph, Finding VII, Transcript, p. 25.) This latter finding is irrelevant to any issue involved in this case and may be regarded as surplusage.

The court further finds, in the same paragraph, that—

> The foundation * * * thus previously constructed were fully consolidated when the contract with claimant was let.

The words "and the core" were omitted from the above-quoted sentence for the reason just stated, that no issue in this case is involved with respect

to any part of the work between station "C–55" and the shore. The "foundation" referred to consisted of "a brush mattress weighed down by stone," as stated in claimant's brief (p. 2).

What the claimant was to do under his contract was to build up the core with the small riprap on this foundation, place the slope stones or large riprap thereon, and cap the same with the crest blocks and "selected" pieces of large riprap. The method or manner of placing the materials is provided for in paragraph 61 of the specifications. (Transcript, p. 6.) That part of it which is pertinent to the issues involved in this case reads as follows:

> From the vicinity of station 55 seaward the method of construction shall be as follows: A mound of small riprap shall first be built up and around the existing structure to about 1 foot elevation. *When in the judgment of the United States agent in charge this mound has become fully consolidated*, its gaps and interstices shall be filled and its crest leveled with small riprap, generally one-man stone. *Large blocks shall then* be bedded in the crest of the mound in two rows, breaking joints with their longest dimension parallel to the axis of jetty in such manner that voids under the placed blocks will be at a minimum, and side slopes and remainder of crest shall then be covered with large riprap. (Italics ours.)

The court finds that "when claimant had completed from 100 to 200 feet of the core, he requested from the inspector in charge permission to begin to lay the crest blocks, which was refused, on the ground

that the core had not consolidated." The finding does not state in this connection or elsewhere when that condition was arrived at and when that request was preferred, but it must have been prior to the end of December, 1903, because in the next sentence the court finds that by the end of December, 1903, claimant had completed 400 to 500 feet of the core, when "again he requested permission to impose the crest blocks." The inspector, it is said, refused, and continued to refuse permission to lay said crest blocks until May, 1904, by which time about 1,400 or 1,500 feet of the core had been completed. The reason assigned by the inspector for refusing permission to lay said crest blocks was that the jetty had not had sufficient time to consolidate. The court says: "*It was manifest that large parts of the work done by him* (the contractor) *had fully settled and consolidated*" during and through December, 1903, and January, February, March, and April, 1904.

It is further found that it would have been advantageous to claimant to have been allowed to "impose the crest blocks on the top of the core as rapidly as possible," so that claimant would have a calm sea on the lee side of the jetty in which to moor his barges and proceed with the work. It is found that when about 300 feet of the core had been built up to the required elevation, "slope stones"—large riprap—were laid on the side of the jetty, which afforded some protection from the action of the waves to the riprap already constructed, but not as much protection as

the crest blocks would have afforded. The court then finds that if the contractor had been permitted to lay the crest blocks as requested, he would have been able to work *60 days* more than he did between December, 1903, and May 7, 1904. It does not appear that the contractor ever appealed to the engineer in charge from the refusal of the inspector to grant permission to lay the crest blocks. The request was to the inspector, and the refusal was by him and him alone.

The court awarded judgment on this item for $9,762, this amount being derived from allowing the $162.70 average daily cost (Finding 17, Transcript, p. 28), for said 60 days.

This item is contested here by the Government. (Assignment of error 2, post, p. 22.)

It is also contested by the claimant on the ground that the delay was 145 days instead of 60. (First Assignment of Error, claimant's brief, p. 10.)

The contract provided that—

> Whenever the contractor furnishes board and lodging to his own employees, he shall also, if required by the engineer officer in charge, furnish suitable board and lodging to such employees of the United States as are connected with the work, all at reasonable rates satisfactory to the engineer officer in charge, to be paid for by the United States with the monthly payments. (Petition, par. 5, Transcript, p. 7.)

During the performance of this contract claimant furnished board and lodging to employees of the

United States at the request of the engineer officer in charge, and was paid therefor at the rate of $15 per month, which the court finds was—

> the usual and customary price paid by the United States for the board and lodging of its employees at other points in Texas.

The court finds further that the actual cost to the contractor of boarding *his* employees was "about $20 per month." (Finding 11, Transcript, p. 26.) Claim was made in the petition for the actual cost to the contractor of boarding each person for the United States, which was alleged to be $20 per month. The amount claimed was $130. (Petition, par. 17, Transcript, p. 18.)

The court disallowed this claim, which disallowance is assigned as error by the claimant. (Fifth assignment of error, claimant's brief, p. 10.)

The contract provides:

> "If at any time it should, in the opinion of the engineer officer in charge, become necessary to do any work * * * not herein specified for the proper completion of this contract, the contractor shall furnish the same at the current rates existing at the time of said * * * work; said current rates to be determined by the engineer officer in charge, and payment therefor to be made with the monthly payments. Such labor * * * as may be required from time to time to aid the employees of the United States in inspecting, in making supervision, or in other matters connected with the work, shall be furnished for the

time by the contractor at cost price (as determined by the engineer officer in charge exclusive of contractor's charges for superintendence, etc.), whenever required by the United States agent in charge * * *." (Par. 42, Transcript, p. 5.)

Under this provision of the contract claimant did furnish labor called for by the United States engineer officer in charge, which labor the contractor was paying $60 per month. The United States engineer officer in charge allowed and paid him $2 per day as the "cost price" of said labor for 140 days actually thus furnished. (Finding 12, Transcript, p. 27.)

Claimant in his petition asked compensation for this labor at the rate of $6 per day on the ground that he had to pay his laborers for each calendar day, and that by reason of the interruptions to the work from the occurrence of Sundays, holidays, bad weather, and other causes which prevented them from performing labor on certain days the actual cost of the labor on the days that his employees *did* work was $6 per day per capita, and that therefore the engineer in charge should have allowed him that sum as the "cost price" of said labor. (Petition, par. 18, Transcript, p. 18.)

The court disallowed this item of the claim, and such disallowance is made the basis of the fourth error assigned by claimant. (Claimant's brief, pp. 10 and 17.)

The contract provided:

> * * * If the work is not completed within the period stipulated in the contract,

the engineer officer in charge may, with the prior sanction of the Chief of Engineers, waive the time limit and permit the contractor to finish the work within a reasonable period to be determined by the said engineer officer in charge. Should the original time limit be thus waived, all expenses for inspection and superintendence and other actual loss and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said engineer officer in charge and deducted from any payments due or to become due to the contractor; provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, waive for a reasonable period the time limit originally set for completion and remit the charges for expenses of superintendence and inspection for so much time as, in the judgment of the said engineer officer in charge may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal forces or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforeseeable causes of delay arising through no fault of the contractor and which prevented him from commencing or completing the work or delivering the materials within the period required by the contract. (Par. 35, Transcript, p. 3.)

During the progress of the work an epidemic of yellow fever broke out in the State of Texas and a quarantine was proclaimed and enforced at San Antonio for 15 days, which prevented any stone being

shipped from the quarries to Rockport. During this period of 15 days claimant's force at the quarries became disorganized and 15 days' additional time was consumed by the contractor in reorganizing his labor force and getting into condition where the shipments of stone could be resumed. In the settlement for the performance of this contract, the engineer officer in charge remitted the expenses of superintendence and inspection for 15 days, the period covered by the quarantine. (Par. 13, Transcript, p. 27.)

Claimant, in his petition, asked that the expenses of superintendence and inspection be remitted for a "period not less than one month" and that judgment be allowed him for the difference between the amount of such expense for 15 days, the period allowed by the engineer officer in charge, and 30 days, the period claimed. (Petition, par. 19, Transcript, pp. 18, 19.)

The court entered judgment in favor of the claimant for $125, for said expenses for the 15-day period aforesaid. This item is here contested by the Government. (Assignment of error 3, post, p. 22.)

Just at the commencement of the work by claimant, a tugboat chartered by him and under the pilotage of a regularly licensed pilot, was grounded on the sand bar near the site of the jetty. This accident delayed the work on the jetty 30 days. The grounding of said tugboat was not the fault of either the United States or the claimant. In the settlement

for the performance of this contract the engineer officer in charge deducted $320 as expense for superintendence and inspection during said period of 30 days. (Par. 14, Transcript, p. 27.)

Claimant in his petition asked that judgment be entered in his favor for the amount of said deduction, on the ground that, under the contract, the engineer in charge "was bound to extend the time for the completion of the work one month without charging him the expenses of superintendence and inspection," on account of the grounding of said tugboat. (Petition, par. 20, Transcript, p. 19.)

The court entered judgment in favor of the claimant for said amount. (Conclusions of law, Transcript, p. 28.)

This item is contested here by the Government. (Assignment of error 3, post, p. 22.)

In the final settlement for the performance of this contract a total of $2,264.17 was deducted for the expenses of superintendence and inspection; that is to say, the engineer in charge refused to "remit" such expenses. The court apparently allows the claimant judgment for about $750 of said amount as expenses for superintendence and inspection deducted for the period of 70 days' delay charged to the Government on account of the rejection of the crest blocks and the refusal to permit the laying of crest blocks at the time requested. This item is contested by the Government for the same reason that it contests the main items of damages claimed on account

of said rejection and refusal. (Assignment of errors 3, post, p. 22.)

The claimant personally superintended the work during the whole of the time it was in progress. His services "in so doing" were worth $750 per month.

The court further finds that during the period of the work he had no other employment and was not engaged in any other enterprise. (Finding 18, Transcript, p. 28.)

Claimant, in his petition, asks compensation at the rate of $800 per month for the loss of his services during a period of 4⅒ months. (Petition, par. 23, Transcript, p. 20.)

The court apparently awarded judgment in favor of the claimant for the loss of his own services at the rate of $750 per month for the 70 days (2⅓ months) delay charged to the United States, as before stated.

This item is contested here by the Government, for the same reason that it contests the items allowed for loss of time and damages resulting from the rejection of crest blocks and the refusal to permit the laying of the same before the time stated. (Assignment of error, 4 *post*, p. 22.)

Claimant assigns error on this item in that the court should have entered judgment at the rate stated for an additional length of time, in which it is claimed the contractor was delayed by the act of the United States. (Second assignment of error, claimant's brief, pp. 10, 15.)

ASSIGNMENTS OF ERROR.

The Court of Claims erred:

1. In rendering judgment against the United States on the facts stated in the sixth finding of fact. (Transcript, p. 23.)

2. In rendering judgment against the United States on the facts stated in the seventh finding of fact. (Transcript, p. 24.)

3. In rendering judgment against the United States on the facts stated in the thirteenth, fourteenth, and sixteenth findings of fact. (Transcript, pp. 27, 28.)

4. In rendering judgment against the United States on the facts stated in the eighteenth finding of fact. (Transcript, p. 28.)

ARGUMENT.

I.

FIRST ASSIGNMENT OF ERROR.

Rejection of the crest blocks.

The full provision of the contract with reference to the kind and character of the stones to be used in constructing the jetty is as follows:

> Small riprap shall be in pieces weighing from 10 pounds to 2 tons, but not over 25 per cent by weight shall be "one-man stone." Large riprap shall be in pieces of not less than 2 tons in weight, and the average weight shall not be less than 4 tons. Large blocks shall be granite or other rock weighing not less than 160 pounds per solid cubic foot. It shall be of good durable quality, hard, tough, sound,

> clean, of compact texture, free from loose seams and other defects. *Blocks shall be as closely rectangular in form as practicable and varying not over 6 inches from the dimensions 3½ feet by 5 feet by 8 feet. Their bed surfaces shall be as nearly plane as practicable.* (Transcript, p. 6.) (Italics ours.)

It was also provided in the second section of the formal agreement as follows:

> 2. All materials furnished and work done under this contract shall, before being accepted, be subject to a *rigid* inspection by an inspector appointed on the part of the Government, and such as does not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final. (Transcript, p. 10.) (Italics ours.)

The dispute between the contractor and the engineer in charge with relation to the rejection of crest blocks arose primarily over the method of measurement, the contractor contending that the specifications provided for "mean" measurement, while the engineer in charge contended that they plainly required "extreme" measurement. What these two expressions mean has already been referred to in the statement of this case. It seems too plain for argument that *extreme* measurements was what was provided for in the contract. If *mean* measurements were to be adopted, a stone might be 12 feet long at its greatest length and only 5 feet at its shortest, and yet vary not over 6 inches from the required

length, 8 feet. Likewise, it might be 8 feet wide at its greatest width and only 2 feet wide at its narrowest width, and yet its mean width would not vary over 6 inches from the required width of 5 feet, and so as to its thickness. In order to determine whether a given stone varied not more than 6 inches from the specified dimensions, it was absolutely necessary that its maximum and minimum length, breadth, and thickness be measured. It does not seem necessary to look further than to the contract itself to reach this conclusion.

But it is not found by the court, and it was not a fact, that all of the 90 stones rejected were rejected merely because they varied more than 6 inches from the specified dimensions. Those dimensions were a prerequisite in all cases; but there was something more. The stone had to be "as closely rectangular in shape as practicable." A stone might come within the specified dimensions and yet not conform to the requirement as to shape. For instance, a stone which was 5 feet 6 inches at one end on the top surface and 4 feet 6 inches at the same end on the bottom surface, and vice versa at the other end, would not be as "closely rectangular as practicable."

Again, stones were not only required to conform to the specific dimensions and be as closely rectangular in shape as practicable, but their bed surfaces were to be "as nearly *plane* as practicable." The purpose of this latter provision will be apparent when it is called to mind that these blocks were to be laid along the crest of a core built up from the bottom of the sea

by small riprap. That is the reason they are called crest blocks in the specifications. If they were not "as nearly plane as practicable" on the under surface, difficulty would be encountered in getting them to lie firmly on the core. The evident purpose of these requirements as to the size and shape of the crest blocks was to secure uniformity and evenness in the finished top of the jetty.

But whether the stones in question were rejected because they varied more than 6 inches from the specified dimensions, or whether they were rejected because they were not as closely rectangular as practicable, or because their bed surfaces were not as nearly plane as practicable, makes no difference. The fact still remains that the rejections were made by the United States agents in the performance of their duty and, so far as the findings show, in strict conformity with the provisions of the contract. There is no finding by the court that the stones rejected did *not* conform to the specifications. There is no finding that the decision of the engineer in charge or of his inspector was fraudulent, or that there was bad faith in any form whatever. There is nothing found from which error can be inferred, not even the slightest error, let alone error gross enough to necessarily imply bad faith. It was the duty of the inspector to reject all stones which did not come within the specifications. The decision of the engineer officer in charge as to "quality"—that is, the dimensions and other requirements as to the shape of the stones—was to be final, under

the contract. Under these circumstances, the action of the officers and agents of the United States in the premises will not be disturbed by the court.

United States v. *Barlow* (184 U. S., 123, 133); *Gleason and Gosnell* v. *The United States* (175 U. S., 588, 607); *Railroad Company* v. *Price* (138 U. S., 185, 195); *Railroad Company* v. *March* (114 U. S., 549, 553); *Kihlberg* v. *The United States* (97 U. S., 398, 401); *McLaughlin* v. *The United States* (37 C. Cls. R., 150, 188); *Electric Fire Proofing Co.* v. *The United States* (39 C. Cls., 307); *Zimmerman* v. *The United States* (43 C. Cls. R., 525, 564); *Bowe* v. *The United States* (42 Fed. Rep., 761, 778–780); *Ogden* v. *The United States* (60 Fed. R., 725, 727); *Sweet* v. *Morrison et al* (116 N. Y., 19, 34); *Railroad Co.* v. *Brydon* (65 Md., 198, 220); *Gilmore* v. *Courtney* (158 Ill., 432, 437); *Sanders* v. *Hutchinson* (26 Ill. App., 633, 638); *Gregory, the engineer as arbitrator between the employer and contractor* (1901), p. 56; *Hudson on Building Contracts*, p. 358.

The court did not find that there was any mistake made in reducing the contract in suit to writing, either by the omission or misuse of words or phrases. It did not therefore "re-form" the contract. It did, however, incorporate in its findings a letter from the claimant to the engineer officer complaining about the rejection of crest blocks, in which he stated that he knew it was not contemplated that a slight variation from the exact dimensions given in the specifications should cause the rejection of a stone, if it was as valuable for the purpose for which it was intended as

if it had been within the precise limits of the dimensions. These are not his words, but this is the substance of his statement. (Transcript, p. 24.)

It should be remembered, in this connection, that Mr. Ripley assisted in the preparation of the specification in question, which was unusual. While it is not stated in the record, we deem it not inappropriate to explain that Mr. Ripley had for many years been an assistant engineer for the United States located at Galveston, Tex., and had been connected as a consulting engineer with the improvements being made by the Aransas Pass Harbor Co. He had severed his connection with the Government, and was engaged in contracting. It was his expressed purpose to bid upon the work which the Government had undertaken to do in completing the Aransas Pass jetty. Because of this and his familiarity with that work, and with the methods in the engineer's office, he was invited to assist and did assist in the preparation of the specifications. The purpose and intent of the engineer officer, and of Mr. Ripley as well, was evidently to make the specifications conform as nearly as practicable to the specifications in vogue during the operations of the Aransas Pass Harbor Co. The design—that is, the general shape and location of the work—did conform precisely.

In the specifications of the Aransas Pass Harbor Co. the dimensions of the large blocks of stone were not specifed. (Transcript, p. 3.) In the specifications forming a part of the contract sued upon in the case at bar, those dimensions were specifically set

forth, as indicated above. Presumably, this feature was as good as written by Mr. Ripley himself.

It should be also noted that when he and Prof. Haupt were stating their objections to the specifications published October 10, 1902, nothing was said about the provision in question not being in conformity with the Aransas Pass Harbor Co.'s specifications with reference to the crest blocks. As intelligent men they must have known that the contract specifications did not justify or permit the acceptance of stones which conformed to the specification in the Aransas Pass Harbor Co.'s contract, as stated on page 3 of the Transcript. It is fair to assume that the motive for making the contract specifications as to the size, shape, and dimensions of the crest blocks definite and certain, was to secure a more uniform, compact, and smooth top to the jetty. That certainly was the effect, and Mr. Ripley having contributed his services to the preparation in the first instance of such a specification, and having neglected to state any objections to its presence in the specifications at the time he was engaged in the business of objecting—that is to say, before he submitted his bid—he ought not now to be heard to complain or to urge that he assumed the specifications would not be observed by the United States agents. In short, he has absolutely no ground upon which to base a charge that it was intended to so write or interpret this provision of the specifications as to permit the acceptance of blocks varying in size "from 2 to 5 tons" and weighing "not less than 135 pounds per

cubic foot dry," which latter provisions were those made in the Aransas Pass Harbor Co.'s specifications.

That the authorities of the United States did not admit there was any mistake made in reducing these provisions to writing, or in the interpretation and application thereof, is self-evident from the fact that they would not accept any stone as "valuable or more valuable to the Government," and which would make the work "as stable or more stable than if the dimensions conformed strictly to the letter of the specifications," *until* a contract formally entered into providing for such modification had been finally approved.

In short, there was no mutual mistake made in reducing this contract to writing, consequently there was nothing to reform. (*United States* v. *Milliken Imprinting Company*, 202 U. S., 168, 177; *Boston Iron Works* v. *The United States*, 34 C. Cls. R., 174; *Cullinane* v. *The United States*, 18 C. Cls. R., 577; *Harvey* v. *The United States*, 13 C. Cls. R., 322; *Ellicott Machine Co.* v. *The United States*, 44 C. Cls. R., 127, 130.)

The terms of the specifications are plain and unambiguous. It is impossible to find anything therein, or anywhere in the contract, from which it can be inferred that any other meaning than that conveyed by the exact words and figures used was intended. If the contract did not express the agreement of the parties and the true intent or understanding of the claimant, it was "his folly to have signed it." (*Brawley* v. *The United States*, 96 U. S., 168.)

It may be contended that the size, shape, and dimensions of the crest blocks as set forth in the contract specifications should be interpreted to mean the same as the specifications in the Aransas Pass Harbor Co.'s contracts (Transcript, p. 3) because the appropriation act provided that the work should be done "in accordance with the design and specification of the Aransas Pass Harbor Co." and because the contract provided that nothing in the specifications should "be interpreted as violating any of the requirements and provisions" of said part of said act.

A sufficient answer to this contention was made by the Court of Claims upon its first consideration of this case, wherein it was held that the claimant having consented to the contract made and having performed the work thereunder and been paid therefor, no fraud or gross error being charged, it was too late for him to raise objections to the specifications as being contrary to the requirements of the act in question and the specifications of the Aransas Pass Harbor Co. (43 C. Cls. R., 490, 496.)

The rule that contracts are to be most strictly construed against those who draw the same does not militate against the United States in this case, because, as has been pointed out, the claimant himself collaborated with the agents of the United States in preparing the contract.

For the reasons stated the judgment of the Court of Claims on this item should be reversed.

II.

SECOND ASSIGNMENT OF ERROR.

Refusal to permit the laying of crest blocks.

The manner of performing the work of constructing this jetty was provided for in the sixty-first paragraph of the specifications and is set forth in full in the statement of the case (ante, p. 13).

From these provisions of the contract it is as clear as language could make it that the time and manner of laying the crest blocks on the work was a matter entirely within the judgment of the United States agent. Claimant agreed to this, and all that he could expect and all that he was entitled to was the honest and unbiased judgment of the agent of the United States.

The court finds that after he had completed from 100 to 200 feet of the core he requested permission to begin laying the crest blocks, which was refused, on the ground that the core had not consolidated. This was some time before the end of December, 1903. He continued from time to time to make such requests, but was not permitted to begin laying said crest blocks until the first part of May, 1904, when such permission was granted. The court further finds that the only reason at any time given by the inspector for refusing to permit the laying of the crest blocks was that the jetty had not had sufficient time to consolidate. It seems to us that this was reason sufficient, and, unless the judgment of the inspector was dishonestly, fraudulently, or capriciously exercised, claimant has no right, under the

law of the contract, to complain thereof. (See the cases cited under the preceding title.)

There is a finding by the court that during the time the inspector was refusing permission to lay said slope stones "it was manifest that large parts of the work done by him had sufficiently settled and consolidated." This finding, we submit, is not sufficient to constitute a finding of bad faith, fraud, or caprice, nor is it a finding of such gross error as necessarily implies bad faith. In effect it is merely an expression of the opinion of the court that because of the lapse of time the "core" of the jetty must have settled sufficiently to have warranted the laying of crest blocks. We think that it was not competent for the court to express such a view in its findings of fact. The inspector, who was a civil engineer, was on the ground. His judgment as to the matter committed to him was more likely to be correct than that of the court, which was 2,000 miles away from the site of the jetty and which passed judgment upon the matter five or six years after the event. It is possible, of course, that the inspector was mistaken; that he withheld his permission longer than was necessary; but this does not warrant the imputation of bad faith to him, nor does the possibility of his being mistaken about it justify the conclusion that he was grossly in error. Certainly the mere statement by the court in its findings that "it was manifest" that the core had settled or consolidated sufficiently to permit the laying of crest blocks is not a finding of bad faith or such gross error as to necessarily imply bad faith.

But there is another and all-sufficient reason why the claimant can not now be heard to complain of the inspector's refusal, in that he did not complain of it at the time. There is no finding of fact by the court that the refusal of the inspector was ever appealed from or that any attempt was made in any form whatever to have the engineer in charge overrule him in the matter. The absence of such a finding is conclusive of the fact that no objection, protest, or appeal was presented to the engineer in charge or to the chief of engineers. (*Sun Mutual Insurance Co.* v. *Ocean Insurance Co.*, 107 U. S., 485, 500.) If the claimant felt that this refusal to permit the laying of crest blocks was a violation of the contract, or that the inspector was acting in an arbitrary or capricious manner in so refusing, the way was open for him to appeal to the engineer in charge. (Contract, par. 2, Transcript, p. 10.) He did not do so, and it would seem that he ought to be estopped from now complaining. His failure to protest or to seek in any way to have the inspector overruled in the matter was an acquiescence in his conduct. (*Lewman* v. *The United States*, 41 C. Cls. R., 470, 475; *Hawkins* v. *The United States*, 96 U. S., 689; *Bowe* v. *The United States*, 42 Fed. Rep., 761, 778.)

The case of *Madison J. Bray, Trustee, etc.*, v. *The United States* (No. 22954, Court of Claims), decided February 13, 1911, involves the identical points at issue here. The facts in the Bray case are a little more favorable to claimant than in the case at bar, in that it there appears the contractor did protest to

the local engineer, at least, while in the case at bar the objection or protest was confined to the inspector at the site of the work.

The court, in its opinion, said:

> The findings show that while the contract company protested both to the inspector and the local engineer against being compelled to lay the cement masonry as it was required to do, it never lodged any such protest with Maj. Bixby, the engineer officer in charge of the work. The specification made the latter officer the final arbiter "upon all matters relating to the work and upon all questions arising out of the specifications." It will thus be seen that the contract provided a forum where the contract company could have gone and presented its grievances, but it failed to do so. We do not think it can now be heard for the first time to present these grievances in this court. (*Bowe* v. *The United States*, 42 Fed. Rep., 761; *Bigelow on Estoppel*, p. 633.)

If we are right in either view of this matter, that is to say, if the judgment of the inspector was honestly exercised and was not so grossly in error as to imply bad faith, or if the failure to appeal from his decision to the engineer in charge necessarily implies an acquiescence in his decision, the judgment of the Court of Claims on this item should be reversed.

The claimant assigns error on this item upon the ground that it appears from the findings that the delay caused by the refusal of the inspector to permit the laying of crest blocks during the period indicated was not 60 days but 145 days, and that, therefore,

the judgment should be $23,591.50 instead of $9,762. The court finds that if claimant had been permitted to begin laying crest blocks when he first asked permission he would have been able to work 60 days more than he did between that time and May 7, the date on which the first crest blocks were laid. Inferentially then, this refusal did not delay the work a single day *after* the 7th of May, 1904. How then can it be said that but for the refusal aforesaid the work might have been completed 145 days earlier than it was? It is argued (claimant's brief, p. 14) that if claimant had not been delayed by reason of the rejection of the crest blocks and the refusal to permit the laying of crest blocks, he would have been able to finish the work 12 days before the 7th of May, or by April 25, 1904. This argument is predicated upon the fact that the actual working days subsequent to May 7 were only 58, 12 less than the number of days the court finds the Government delayed the contractor, and that, therefore, the real and actual result of the delay charged to the Government was to postpone the completion of the work from April 25 to September 17, 1904, a total of 145 days. This conclusion, we submit, is purely speculative, and not supported by any finding of fact made by the court below.

For the reasons heretofore stated, we do not think the Government is chargeable with any delay whatever; but if it is it can only be for the number of days which the court finds the particular acts complained of delayed the work. The finding is for 70

days all told. That is an "ultimate" fact which it is well settled this court will not go behind.

III.

Board and lodging.

The contract provision with relation to board and lodging is set forth in full in the statement of the case for the United States (ante, p. 15).

Acting under the authority of said provision of the contract, the engineer officer in charge requested claimant to furnish board and lodging for certain employees of the United States engaged on the work as inspectors, and in the monthly settlements had with claimant for the performance of the contract payment was made to the claimant for the board and lodging of said employees at the rate of $15 per month.

It does not appear from the finding that any objection or protest was made at that time by the claimant to the amount thus allowed. It was the usual and customary price paid by the United States for board and lodging of its employees at other points in Texas. There was no other place at which the employees of the United States could be conveniently lodged or boarded. Claimant had erected temporary quarters on shore and established a commissary department for his own convenience. He says, and the court sustains his statement, that it actually cost him "about $20 per month" to board his employees. The court does not find the number of months' board furnished. This may be determined, however, by the amount paid under the allowance made by the

engineer from month to month, which the court finds to have been $261.50. The allowance being at $15 per month, we find that about 17½ months were paid for. If the claimant is now entitled to "about" $5 per month additional, he would be entitled to "about" $87.50. The court disallowed this item, and such disallowance is now made the basis of the claimant's fifth assignment of error. (Claimant's brief, p. 18.)

The principle of law which runs through the cases cited in connection with the first and second assignments of error is applicable here. The rates to be paid for board and lodging were to be "*reasonable rates satisfactory to the engineer in charge.*" What was the customary and usual price paid by the United States for board and lodging under similar circumstances was certainly a "reasonable" rate. The court has not found that it was not a reasonable rate nor has it found anything which in the slightest degree tends to show that in fixing that rate, in determining what was "satisfactory" to him the engineer acted in bad faith. Certainly it can not be said that by allowing $15 per month when the actual cost was "about $20 per month" he committed such gross error as to necessarily imply fraud or bad faith, especially when it does not appear that claimant informed him at the time of the so-called actual cost. If the claimant was not satisfied with the allowance made by the engineer the time for him to complain was when it was made. There is nothing in the finding to show that he ever, until the filing of the petition in this case, found any fault with this al-

lowance. His silence at that time must be regarded as an acquiescence in the action of the engineer (Lewman and other cases cited, ante, p. 33). The judgment of the Court of Claims on this item should be affirmed.

IV.

Cost of labor.

The provision of the contract under which labor was furnished by claimant is quoted in the statement of the case for the United States (ante, p. 16).

The labor which the United States engineer required was used in making necessary soundings and surveys to determine the amount of work done by the contractor, etc. This labor was called for, of course, only on days when such work was to be done and the "weather permitted." If the weather was too bad for the United States to work on these matters it was too bad for the contractor to work. Consequently it happened that the contractor lost the services of certain of his employees on days when he could have used them. The gist of claimant's contention is that he was paying these men $2 per day for each calendar day, and inasmuch as they only worked about one day in three, the actual labor performed was costing him $6 per day, and, therefore, the United States engineer in determining the "cost price" of said labor, should have taken the $6 per day as the basis.

The court disallowed this claim, which disallowance is made the basis of the fourth assignment of error by claimant. (Claimant's brief, p. 17.)

Payments were made for this labor along with the monthly settlements. There is nothing in the finding to indicate that at the time the claimant made any objection or protest on account of the allowance being only $2 per day for labor. In fact there is nothing to show that he ever, until the filing of the petition in this case, claimed the additional $4 per day for such labor. For the reasons stated in connection with the preceding items the judgment of the court on this item should be affirmed.

V.

Remission of inspection charges on account of yellow-fever quarantine.

The provision of the contract with relation to the extension of time and the remission of the expenses of superintendence of and inspection charges, etc., is quoted in full in the statement of the case for the United States (ante, p. 17).

The quarries from which the stones to construct this jetty were obtained were so located that the stones had to be hauled through the city of San Antonio. The quarantine at San Antonio against the yellow fever lasted exactly 15 days. During this time no shipments could be made. During this period the claimant says, and the court supports him in its finding, his labor force at the quarries became disorganized, and after the quarantine was lifted it took him about 15 days to get his men back to work and to get stones going forward to Rockport again.

When it came to making the final settlement for this work the engineer in charge, in computing the amount of deductions which should be made on account of the expense of superintendence and inspection, remitted only $125, the amount of such expenses for the period of 15 days, whereas the claimant insisted and still insists that the actual loss of time to him on account of the yellow-fever quarantine was 30 days. The court apparently agrees with his contention, for it allowed him judgment for $125, being the amount which the engineer refused to remit on account of the additional 15 days' loss of time claimed.

It will be observed that the contract did not give the claimant any absolute right to demand or compel the remission of the cost of superintendence and inspection for a single day on any account. The whole matter is there left to the discretion of the officer in charge, who *may*, with the prior sanction of the Chief of Engineers, *waive the time limit*. The engineer would have been entirely within his rights under the contract if he had refused to remit those expenses for any part of the time covered by this quarantine. Having once decided to waive the time limit, it was made his contract duty to remit said expenses for that period. But under the principle of law running through the cases heretofore cited, it was not competent for the Court of Claims to review or revise in any way the action of the engineer in the premises. There is no allegation of positive fraud

in refusing to remit the expenses for more than 15 days on this account; there is no finding of the court of positive or constructive fraud, but even if there had been allegation, proof, and a finding that the refusal was capricious and arbitrary, the claimant would have no remedy, for it was not mandatory on the engineer to waive the time limit on any account.

For these reasons the judgment of the Court of Claims on this item should be reversed.

VI.

Remission of inspection charges on account of the grounding of a tug.

This item of $320 is in the same class as the preceding one (Finding XVI, Transcript, p. 27). The tugboat in question was chartered by claimant and was proceeding to the site of the work when it grounded on a sand bar. As the court well says in the finding, this was not the fault of the United States nor was it due to any fault or negligence on the part of the claimant. The tug was in charge of a regular licensed pilot and presumably it was his fault, but so far as the real issue with respect to this item is concerned it makes no difference whose fault it was. The engineer in charge in making the final settlement for the work declined to extend the time and remit the supervision and inspection expenses for any part of this 30 days. His refusal was final and conclusive. (See authorities heretofore cited.) For these reasons the judgment of the Court of Claims on this item should be reversed.

VII.

Remission of inspection charges on account of delay caused by the United States.

This is a part of the item of $2,302.32, now claimed. (Claimant's third assignment of error, brief, p. 15.)

It appears from the sixteenth finding (Transcript, p. 28) that the Court of Claims allowed, in addition to the two preceding items of $125 and $320, respectively, $748.05 as the amount of the expenses of superintendence and inspection for the 70 days' delay charged by the court to the United States on account of the rejection of the crest blocks and the refusal of permission to begin laying the same at the time requested.

The claimant assigns error on this allowance, because he says the time should have been extended and consequently the expenses of superintendence and expenses remitted for a total period of 145 days instead of 70.

The Government contests this allowance and assigns error thereon (third assignment of error, ante, p. 22) on the ground already stated in connection with the two preceding items and for the further reason that the acts of the United States agent in rejecting the crest blocks and refusing permission to lay the same were in no sense a breach of the contract. (See items 1 and 2, ante, pp. 22, 31.) For the reasons there stated the judgment of the Court of Claims on this item should be reversed and the court directed to render judgment in favor of the United States on the findings made.

VIII.

Claimant's loss of time.

The court's Finding XVIII (p. 28) does not make it clear just what it intended to allow on this item. It fixes the value of claimant's personal services at $750 per month and then stops with the statement that at the time he had no other enterprise under way and was not employed in any other business than superintending the work of construction under this contract. From the tenor of this finding it might be inferred that judgment had not been entered in favor of the claimant on this particular item. However, it is mentioned, in the conclusion of law, as one of the items on which the total amount of judgment is based, and by a computation outside of the record it is found that the court allowed claimant $750 per month for two and one-tenth months, the time which it found he was delayed by reason of the rejection of the crest blocks and the refusal to permit the laying of the same. (Items 1 and 2.)

Claimant assigns error on this item on the grounds that the allowance should have been $750 per month for four and five-sixths months, or the 145 days' delay claimed. (Claimant's second assignment of error, brief, p. 15.)

The United States assigns error on this item on the ground that there was no breach of contract on the part of the United States in rejecting the crest blocks or refusing permission to begin laying the same.

The judgment of the Court of Claims on this item should be reversed and the court directed to render judgment in favor of defendant.

For the reasons stated in connection with the discussion of the assignments of error of the respective parties here, we submit that the judgment of the Court of Claims should have been in favor of the United States upon each of the items of the claim in issue, and the petition dismissed. The judgment of the Court of Claims should, therefore, be reversed with instructions to dismiss the petition.

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Attorney.

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In the Supreme Court of the United States.

OCTOBER TERM, 1910.

HENRY C. RIPLEY, APPELLANT, v. THE UNITED STATES, APPELLEE.	No. 887.
THE UNITED STATES, APPELLANT, v. HENRY C. RIPLEY, APPELLEE.	No. 888.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR THE UNITED STATES.

Counsel for claimant in their reply brief persist in the assertion that the United States Engineer's Office, from the Chief of Engineers down, was so violently opposed to the scheme on which this jetty was being built that, either by direction of higher authority or spontaneously, the inspector and other employees engaged on the work systematically harassed and obstructed the contractor by arbitrary and capricious decisions. The patience of this poor contractor is likened unto that of Job by the learned counsel for claimant.

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We would content ourselves with what has been said on this subject in the brief for the United States, page 2, were it not for the fact that counsel for claimant have dragged into this controversy a finding which they seek to construe as evidence of "malice." We refer to finding IX, transcript, page 26. The Court of Claims allowed nothing on this finding, and its failure to do so has not been assigned as error by the claimant.

In the first place, counsel, in their statement, are apparently laboring under a misapprehension as to what class "the large pieces of riprap selected for use at the sides of the crest blocks" belonged. They seem to have the impression that these were "slope stones." They were not. As counsel stated (reply brief, p. 1), claimant was *permitted* to lay slope stones before laying crest blocks. The selected pieces were to fit in the triangular space which would be left between the upper end of the slope stones and the side of the crest blocks, when they should be laid. They were to be paid for under the contract at $4.25 per ton, while the slope stones were to be paid for at $4.60 per ton. These stones were necessarily of odd shape, being practically triangular and would fit in the space so left, as above indicated, like an inverted pyramid. Necessarily such pieces had to be "selected," as the other stones were quarried and as they happened to appear in the process of getting them out. Otherwise special means would have been necessary to quarry them. They could not be used, of course, until the crest blocks were laid. Conse-

quently, when they were "selected" and brought to the site of the jetty they had to be stored there or somewhere else until the crest blocks were laid. Claimant wanted to store them on the jetty, but insisted that if the waves washed them off to the side of the jetty, he should be paid for them as large riprap, because, he said, they would take the place of large riprap. The inspector and engineer in charge informed him that if he "stored" these selected pieces on the jetty, he must take the risk of the loss of the same; that he would not pay for them as large riprap, in which he was entirely justified for two reasons:

First, because large riprap was to be paid for at $4.60 per ton, while the selected pieces were to be only $4.25 per ton, and—

Secondly, because of a contract provision (par. 43 of the specifications) not incorporated by the court in its findings or set forth in the petition, but which we will take the liberty of here quoting so much of as applies to the subject of this discussion:

> The United States will not be responsible for the safety of the contractor's employees, plant, or *materials*, nor for the damage done by or to them from any source or cause. * * * The decision of said officer as to matters of this character shall be final.

If this item of damages for alleged loss of time was an issue, it would have been necessary for us to have suggested a diminution of the record and brought before the court in due form the paragraph of the

specifications above quoted, but inasmuch as no assignment of error was made by claimant on this item, it was not deemed necessary to further delay the disposition of this case by such a proceeding. It will not be questioned that the contract in suit contains the above-quoted provision, in view of which fact it does not seem to us that the action of the engineer or his inspector in the premises sustains the insinuation that those officers were seeking to harass and obstruct the claimant in the performance of his contract because of any opposition to the design or plan upon which the jetty was being built, or for any other reason.

DEFENDANT'S FIRST ASSIGNMENT OF ERROR.

We do not desire to add anything to what has already been said in support of this assignment of error in the brief for the United States, pages 22 to 30.

DEFENDANT'S SECOND ASSIGNMENT OF ERROR.

Claimant's counsel have no right to say that "about two months" after the 18th of August, 1903, the inspector refused the contractor permission to lay the crest blocks upon that portion of the core which he had first completed. The court did not so find. As pointed out in our original brief, the court did not state when the first refusal occurred. It is not improper, we take it, to say that there was a complete variance between the testimony submitted on this subject on behalf of the claimant and that on behalf of the defendants. It was the end of Decem-

ber, according to the finding, before as much as 400 feet of the core had been built up, but it must be remembered that at this time the contractor had been "permitted," not *required*, to lay some slope stones, which afforded protection to the core itself and some protection to the plant of the contractor. (Finding VII, transcript, p. 25). It is not fair, therefore, to say that the request to lay crest blocks was made as early as October 18. It was at least a month and a half later. But that is not a matter of much importance. The tendency of it is to strengthen the argument used here and in the Court of Claims, by the claimant, that so much time having elapsed after the core was built up it must have fully consolidated long before May, 1904, when permission was first granted to lay the crest blocks. The longer the period of time the core was built, ready for the crest blocks, as far as its elevation was concerned, the more forcible this argument. In this aspect it is important to claimant to have the earliest date possible fixed for the beginning of the time when the core was built up.

Upon the subject of the legal effect of the court's finding that it was "manifest" that the core had fully settled and consolidated, we do not care to say anything further than was said in the original brief (p. 32). Counsel for claimant have in a very adroit way brought before this court the alleged substance of the testimony of certain witnesses called on behalf of claimant. (Claimant's reply brief, p. 6.) We will not transgress the rule further than to say that no wit-

ness called in behalf of the claimant, save the claimant himself, his son, and Prof. Haupt, all interested parties, testified on this subject, and the substance of their testimony was that the core must have fully settled and consolidated, because it had had time to do so. The Court of Claims was evidently impressed with this sort of testimony, for it found that "manifestly" the core had fully consolidated before permission to lay crest blocks was granted. If there had been positive and definite testimony based upon a physical examination of the core to the effect that it had fully settled in December, 1903, or January, February, March, or April, 1904, the court would have said so. But it evidently fell into the same mode of expression as that used in the argument by said interested parties and by counsel for claimant that it must have settled—it couldn't have helped being settled fully and completely, in view of the lapse of time.

The language employed by counsel (reply brief, p. 6) would seem to imply that the inspector or engineer in charge compelled or directed that claimant proceed to build up 1,400 feet of the core of the jetty before he was given permission to lay the crest blocks. There is no finding of fact to justify such an inference. The naked finding is that between fourteen and fifteen hundred feet of core had been completed before that time. It is fully as fair for us to infer that it was done by the contractor of his own volition or at his own request. Likewise with reference to the laying of slope stones more than

300 feet in advance of crest blocks. Counsel for claimant say in their reply brief that he was "permitted" to do this. In that they are exactly correct.

The suggestion that the "United States agent in charge" referred to in the sixty-first paragraph of the specifications, transcript, page 6, was none other than the "inspector" on the site of the jetty is in error. We think that it is perfectly clear that the inspector was not the agent of the United States "in charge." The engineer officer is the person in charge of the work and it would be an anomalous condition if a subordinate of his could be the final judge as to any part of the work. But whether, under the contract, he was the party who was to be the final arbiter in the matter or not, the claimant has made him so and we submit that the findings show as clearly and conclusively as if the statement was therein made in so many words that there was *no* appeal from the action of the inspector, and *no* protest or objection filed thereto with the engineer officer in charge. (See original brief, p. 33.)

We come now to the question of the extent of the delay found by the court and the amount of damages awarded therefor. On this subject counsel for claimant make a new and novel argument, to wit, that in ascertaining the average daily cost of performing this contract, the court should have used as the divisor the number of days actually worked, instead of the number of days from the beginning to completion of said work.

If the United States had been the cause of the contractor's failure to perform work on every day that he did not work, there might be some reason for the claim that the cost per day of doing the work should be based upon the days when work was actually performed. But it should be remembered that when claimant took this contract he understood that he could not work on Sundays and holidays, and, knowing the climatic conditions prevailing in the region where the work was to be done, he knew there would be a number of days each month when the weather would not permit work to be done. The number of Sundays and holidays he could figure upon with some certainty, but the number of days on which he would be prevented from working by bad weather, etc., he must necessarily estimate. He knew, of course, when he made his bid that he must employ his help, charter his tug, etc., and incur expenses therefor on the days when he was not working as well as days when he was working, and he made his bid accordingly. At least it is fair to assume that he did. It necessarily follows that in ascertaining the average daily cost of doing the work the days when no work was done must be taken into account the same as the days on which work was done. Therefore the whole number of days between the beginning and end of the work—392—was properly used as the divisor in ascertaining the cost of doing the work, exclusive of materials. Multiplying the quotient so obtained by the number of days the Government delayed the contractor is, it seems to us, the only

fair and reasonable way of measuring the damage done by such delay. In making this statement we are assuming, for the sake of argument only, that there was a delay for which the United States was responsible.

Counsel insist that there is not the slightest element of speculation in their calculation as to the time when the claimant would have finished the work if he had not been prevented by these alleged delays of the Government. We think there is a very considerable element of speculation in it. In the petition, paragraph 9, transcript, page 15, claimant alleges that but for the interruption to the work during the six months following November 1, 1903, on account of the rejection of the crest blocks and the refusal to permit the laying of crest blocks, he would have been able to work ten days per month more than he did work. Giving the claimant the advantage of every doubt, we find that between August 18, 1903, and May 1, 1904, he worked 73 days. This number of days is arrived at by subtracting the 58 days on which the court says work was performed subsequent to April 30, 1904, from the total number of days worked. (Finding 17, transcript, p. 28.) That is to say, the first 8½ months when the winter season and much bad weather was necessarily encountered, he worked 8½ days per month. Now, after the first of May he had the benefit of the protection afforded by the crest blocks, as well as the summer months to work in, and we would naturally expect that the number of days work would jump from 8½ to 18½, but we find that

in the 4½ months from May 1 to September 17 he worked an average of only 12 and a fraction days per month, so it is apparent that the laying of the crest blocks in November or December, 1903, would not have increased the number of days work in those months more than it did increase in June, July, or August, 1904, after the laying of the crest blocks had begun. There can be no absolute certainty about when the work would have been completed, but it is, we think, reasonably clear, that a delay of 60 days prior to April 25, 1904, did not cause the further delay of 145 after that time.

DEFENDANTS' THIRD AND FOURTH ASSIGNMENTS OF ERROR.

As to these assignments of error, we do not desire to say anything in addition to that contained in our original brief. Speaking, however, with reference to the deduction for superintendence and inspection expenses, we will add that while under the law of the contract the engineer officer in charge was not bound to waive the time limit or remit the inspection charges for any part of the delay caused by the yellow-fever epidemic, or other causes not the fault of the contractor, he was in all good conscience and equity bound to remit such charges for any delay which the United States had caused. The engineer officer in charge, of course, did not concede any delay on the part of the United States on any account whatever. The Court of Claims has found, nevertheless, that the United States did delay the work 70 days all told. If this honorable court affirms the judg-

ment of the Court of Claims on those findings, or grants an additional amount of delay, as contended for by claimant's counsel, it will, of course, follow that the inspection charges deducted for that period of delay should be "remitted" by the court.

Counsel, in their conclusion, refer to the fact that throughout our brief not one word is said in explanation of the assessment of inspection charges during the delay resulting from the "refusal of that core to consolidate." They say that obviously this could not have been the claimant's fault. Certainly not. It was one of the incidents of the contract. It was to be expected that some time would necessarily elapse before the core would consolidate. In addition to that, claimant was not prevented from working at other parts of the work by reason of the "refusal" of the core to consolidate. He was permitted to go ahead and lay additional core and slope stones. The substance finding of the court is that if the crest blocks had been laid he could have done 60 days more of that kind of work within the first six months than he did. In this conclusion we think the Court of Claims is mistaken; but since it has found 60 days' delay chargeable to the United States on this account, we are bound by it, and so is the claimant.

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